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In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

REGINALD DEAN STILL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the offense of attempted bank robbery, in violation of the Bank Robbery Act, 18 U.S.C. (& Supp. IV) 2113(a), requires the government to prove that a defendant had undertaken "actual movement toward the bank or actions that are analytically similar to such movement" at the time that his plans were foiled, regardless of the strength of the other proof that a bank robbery was in the offing.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The revised opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 850 F.2d 607. The initial opinion of the court of appeals is reported at 837 F.2d 871.[1] The

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[1] The revised opinion of the court of appeals is identical to the court's initial opinion except that the revised opinion explicitly upheld respondent's conviction on the charge of interstate transportation of a stolen motor vehicle, added a clause to the second paragraph of the opinion stating that fact, and added the final two paragraphs of the opinion to explain the reasons for the affirmance of that conviction. Because the two opinions are identical with respect to the issue pre-

opinion of the court of appeals on the denial of respondent's rehearing petition (App., *infra*, 10a-13a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1988. A petition for rehearing filed by the government was denied on July 6, 1988. App., *infra*, 9a. A petition for rehearing filed by respondent was denied on September 20, 1988. App., *infra*, 10a-13a. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Bank Robbery Act, 18 U.S.C. (& Supp. IV) 2113(a), provides in relevant part as follows:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion, any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; * * *
>
> * * * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of California, respondent was con-

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sented in this petition, we have not separately reproduced the initial opinion in the appendix.

victed of attempted bank robbery, in violation of 18 U.S.C. (& Supp. IV) 2113(a), and interstate transportation of a stolen motor vehicle, in violation of 18 U.S.C. 2312. The district court sentenced respondent to 15 years' imprisonment on his bank robbery conviction, it suspended the sentence on his stolen vehicle conviction, and it placed him on five years' probation following his release from confinement. The court of appeals reversed respondent's bank robbery conviction.[2]

1. At approximately 10:30 a.m. on August 7, 1985, Kelli Ross saw respondent sitting on the passenger side of a van that was parked at a shopping center in Roseville, California. Ross noticed that the van's motor was running, and she saw respondent put on a long blond wig. Concerned, Ross promptly notified the police. Tr. 9-12. Officer Hensley of the Roseville Police Department arrived about seven minutes later in a marked patrol car and drove in front of the van. The motor of the van was still running. As Officer Hensley started to get out of the patrol car, he saw respondent move from the rear of the van to the driver's seat, put the van in reverse, and drive off. Officer Hensley followed respondent as he sped out of the parking lot and drove through several residential backyards, knocking down fences. Respondent eventually wedged the van between two houses and fled to a nearby camper-trailer, where he was arrested by Officer Hensley and other officers. Tr. 3, 9-12, 36-57. Following his arrest, respondent told Officer Hensley: " 'You did a good job. You caught me five minutes before I was going to rob a

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[2] The court of appeals affirmed respondent's conviction for the interstate transportation of a stolen motor vehicle and remanded the case to the district court for resentencing.

bank. That's what I was putting the wig on for.' " Tr. 58; App., *infra,* 2a-3a.[3]

At the local police station, respondent was interviewed by state and federal agents. Respondent said that he intended to rob a bank to recoup his recent gambling losses. Tr. 206-209. He said he intended to use a fake explosive device, and he was preparing to commit the robbery when he was approached by Officer Hensley in the parking lot. Respondent said that he intended to drive to the drive-up window of the bank and to place the fake bomb and a demand note on the window. Tr. 85-86. Respondent also described the bank that he intended to rob. Tr. 86-87. His description matched the Security Pacific Bank, a federally insured institution located directly across from the shopping center, approximately 200 feet from the spot where respondent was parked. Tr. 87, 145-148, 150, 217; App., *infra,* 3a. At a speed of 15 miles per hour, it would take approximately 35 seconds to drive from that spot to the bank drive-up window. Tr. 217. Respondent also explained why he so candidly confessed his guilt: "What I am telling you is frosting on the cake. When you're caught, you're caught. Everything I am telling you you would learn when you get into that van anyhow, because all of the evidence that you need is located inside of it." Tr. 91.

Inside respondent's van, the officers found a variety of items that implicated him in his planned bank robbery and corroborated his confessions. Among the items was a realistic-looking fake bomb, consisting of a black box with a digital clock on the front, wire, lights, and batteries (Tr. 93-94, 131). Affixed to the fake bomb was tape that could be used to attach the bomb to the drive-up teller's window (Tr. 867). Also found were two demand notes.

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[3] Somewhat later, respondent told Officer Hensley that the van was stolen and asked, "How much do you get for auto theft around here." Tr. 58.

The first note, in typewritten form, said (GX 2):

> DO NOT–I REPEAT–DO NOT SOUND THE ALARM IF YOU DO I WILL LEAVE THE BOMB I HAVE ATTACHED TO THE WINDOW WITH A THIRTY SECOND TIMING FUSE–I WILL KNOW IF YOU RING THE ALARM BELIEVE ME GIVE ME ALL YOUR LARGE BILLS–TO TWENTIES OR TENS IN THE POUCH–FILL IT COMPLETELY–IF YOU ACT QUICKLY I WILL REMOVE THE BOMB AND DRIVE AWAY DO NOT FOR A MOMENT THINK I AM NOT ABSOLUTELY SERIOUS

In printed handwriting under the foregoing was written (*ibid.*):

> HUNDRED–FIFTIES–TWENTIES QUICK–LIFES DEPEND ON YOUR ACTING QUICK I HAVE A POLICE SCANNER I WILL KNOW IF YOU SOUND THE ALARM

A second typewritten note said (GX 3):

> I LIED–THE BOMB STAYS HERE–IT IS DESIGNED TO BE DETONATED BY REMOTE CONTROL AND ANY NEARBY TRANSMISSION OF THE LOCAL POLICE ROBBERY FREQUENCY WILL SET IT OFF AFTER 30 SECONDS–IF YOU SOUND THE ALARM AT ALL–EVEN AFTER I AM GONE–THE BOMB WILL GO OFF–DO NOT BE RESPONSIBLE FOR DESTROYING YOUR BANK AND KILLING THE PEOPLE–INCLUDING YOURSELF–DO NOT SOUND THE ALARM–THIS IS NO JOKE–THE BOMB HAS AN ELECTRONIC SE VO MECHANISM OPERATING IN THE MILLIHERTS RANGE AND IT OPERATES CORRECTLY AND WITHOUT FAIL WHEN IT RECEIVES THE SIGNAL . . .

The long blond wig seen by Kelli Ross was also found in the van (Tr. 98, 158). A police scanner, tuned to the local police department frequency, was also found in the van (Tr. 99-100, 158), as was a note with the radio frequency used by the Federal Bureau of Investigation (Tr. 227-228), a red notebook containing drafts of demand notes and the radio frequency of the Rocklin Police Department (Tr. 101-103), two altered Missouri license plates (Tr. 196), a fake Maine driver's license (Tr. 182-183), and a map of the local area (Tr. 159-168).

2. At trial, respondent pleaded insanity. He did not deny that he was about to rob the Security Pacific Bank when he was spotted by Officer Hensley. The jury rejected his insanity defense and convicted him of attempted bank robbery.

3. The court of appeals reversed. App., *infra,* 1a-8a. It held that attempted bank robbery requires proof of " 'culpable intent' " and " 'conduct constituting a substantial step towards the commission of the crime that is in pursuit of that intent.' " *Id.* at 4a (quoting *United States* v. *Buffington,* 815 F.2d 1292, 1301 (9th Cir. 1987)). The court found that respondent's post-arrest statements and description of the Security Pacific Bank "clearly established" his intent to rob the bank. App., *infra,* 5a. Nonetheless, the court ruled that the government did not prove that respondent had taken a substantial step toward the commission of the crime. Relying on its earlier decision in *United States* v. *Buffington, supra,*[4] the court held that

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[4] In *Buffington,* the defendants assembled the disguises and materials (including handguns) necessary to commit a robbery, they reconnoitered the site of the robbery, they twice slowly drove by the bank while staring into it, they left their vehicle armed, and they stood with their attention focused on the bank. 815 F.2d at 1301-1302; see App., *infra,* 6a-7a. The court found that conduct to be too "tentative and unfocused" to constitute a substantial step toward the commission

"[o]ur facts do not establish either actual movement toward the bank or actions that are analytically similar to such movement," which the court viewed as essential to proof of the crime of attempted bank robbery. App., *infra,* 7a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has erroneously decided a question of considerable importance to the enforcement of the federal bank robbery statute. The court of appeals ruled that a person must be "actual[ly] mov[ing]" toward a bank or must undertake steps that are "analytically similar to such movement" (App., *infra,* 7a) before he has committed attempted bank robbery, regardless of his proximity to the bank or other proof clearly demonstrating that a bank robbery is about to transpire. The decision below will effectively require law enforcement officers to avoid intercepting a suspect until he is virtually at the doorstep of a bank and has moved past the equivalent of his "last clear chance" to avoid what is always a dangerous and oftentimes a life-threatening crime.

1. The Ninth Circuit's construction of the attempt provision in the Bank Robbery Act, 18 U.S.C. (& Supp. IV) 2113(a), is inconsistent with the interpretation of that provision endorsed by four other circuits. Each of those circuits has parted company with the Ninth Circuit by holding that preparatory steps falling short of "actual movement" toward the bank or other functionally equivalent conduct are sufficient to constitute the substantial step toward completion of the crime that is necessary to support a conviction for attempted bank robbery.

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of a bank robbery, because "[n]ot only did [the defendants] not take a single step toward the bank, they displayed no weapons and no indication that they were about to make an entry." 815 F.2d at 1303.

Under the analysis employed by those courts, it is quite clear that respondent's conviction for attempted bank robbery would have been affirmed if his case had arisen in any of those circuits.

The Eighth Circuit in *United States* v. *Crawford,* 837 F.2d 339 (1988), upheld an attempted bank robbery conviction on facts that closely parallel the facts of this case. In *Crawford,* the defendant enlisted the aid of two accomplices; he reconnoitered the site of the bank; he obtained ski masks, gloves, coveralls, and a weapon for use in the robbery; and he had a confederate leave a car to be used in the robbery in a nearby church parking lot. On the morning of the robbery, the defendant was arrested in the parking lot when he attempted to start the car that had been left there overnight for use in the robbery. At the time of his arrest, the defendant was wearing the gloves and had the other equipment with him. 837 F.2d at 339-340. The Eighth Circuit ruled that the defendant's "acts clearly amounted to more than preliminary preparation," because, as in this case, the defendant "took steps directly aimed at the commission of a bank robbery and those steps corroborate the firmness of his criminal intent." *Id.* at 340. The court found that the defendant's actions "constitute[d] a substantial step in furtherance of [the] bank robbery," particularly in light of the fact that, as in this case, it was "the actions taken by the police, rather than the actions taken by [the defendant], [that] ended [his] robbery endeavor." *Ibid.*

Similarly, the Seventh Circuit in *United States* v. *Schramm,* 715 F.2d 1253 (1983), cert. denied, 466 U.S. 930 (1984), affirmed the defendant's attempted bank robbery conviction on the basis of evidence that he had rented a hotel room as a getaway headquarters and had assembled materials, such as a fake bomb, masks, and walkie-talkies, that were to be used in the robbery, even though the

defendant was arrested two miles from the bank while at the office of his parole officer. 715 F.2d at 1255. As the court explained, "[d]efendant's conduct was consistent with a genuine plan to rob the bank which was thwarted only by the F.B.I.'s premature arrest of [the defendant] before he got close to the bank." *Ibid.* (footnote omitted).

The Fourth Circuit in *United States* v. *McFadden,* 739 F.2d 149, cert. denied, 469 U.S. 920 (1984), upheld the defendants' convictions for two different attempted bank robberies, again without requiring that the evidence show that the defendants were on their "final approach" to the bank. In each case, the defendants discussed their plans, reconnoitered the banks, assembled weapons and disguises necessary for the crimes, and proceeded with a getaway car and driver to the vicinity of the bank. In each case, the defendants planned to hide near the bank and then enter it when the employees came to work in the morning, but in each case, their plans were interrupted when they spotted law enforcement officers in the area. 739 F.2d at 151. Even though the defendants had not left their final staging area to enter either bank, the court held that the defendants' conduct in each case was sufficient to support their convictions, because it reflected a firm intent to commit a robbery and constituted a substantial step toward the commission of that crime. *Id.* at 152.

Finally, in *United States* v. *Jackson,* 560 F.2d 112, cert. denied, 434 U.S. 941 (1977) and 434 U.S. 1017 (1978), the Second Circuit affirmed convictions on two counts of attempted bank robbery, based on the defendants' conduct on two separate occasions. On each occasion, the defendants "reconnoitered the place contemplated for the commission of the crime and possessed the paraphernalia to be employed in the commission of the crime—loaded sawed-off shotguns, extra shells, a toy revolver, handcuffs, and

masks—which was specially designed for such unlawful use and which could serve no lawful purpose under the circumstances." 560 F.2d at 120. The court ruled that the defendants' conduct "was sufficient as a matter of law to constitute a 'substantial step' if it strongly corroborated [the defendants'] purpose" (*ibid.*; citation omitted)), which the court found to be the case. Attempt liability, the court noted, "is designed to 'encourag[e] early police intervention where a suspect is clearly bent on the commission of a crime.' " *Id.* at 120-121 n.8 (citations omitted). The court determined that the evidence in that case was sufficient even though the defendants abandoned their goal on both occasions, once after deciding that the conditions inside the bank were not sufficiently favorable for a robbery and on the other occasion after detecting federal agents who were conducting surveillance. *Id.* at 115; see also *United States* v. *Stallworth*, 543 F.2d 1038 (2d Cir. 1976).

Respondent had proceeded at least as far with his preparations for entering the bank as the defendants in *Jackson*, and even farther than the defendants in *Crawford*, *Schramm*, and *McFadden*. At the time Officer Hensley interrupted him, respondent had parked approximately 200 feet from the bank; he had all of the equipment he needed to commit the robbery; his van was running in anticipation of approaching the drive-up window where the robbery was to take place; and he had just put on the blond wig that he planned to use as a disguise. Under the standard adopted by the Second, Fourth, Seventh, and Eighth Circuits, respondent's conduct was clearly sufficient to constitute an attempted bank robbery.

2. The rule adopted by the court of appeals—that a defendant must be actually or constructively moving toward a bank before he can be found guilty of attempted bank robbery, regardless of the strength of the other proof

that he was about to rob the bank—is clearly wrong. Respondent's actions were sufficient to constitute an attempted bank robbery under any reasonable interpretation of the Bank Robbery Act.

Neither the text nor the legislative history of the Act defines the elements of the crime of attempted bank robbery. Nor was there a single clear statement of the legal standard for attempt at common law.[5] Yet while common law courts used a variety of different verbal formulations to define an attempt, the formulations were all directed at the same end: to distinguish between "mere preparation" to commit a substantive crime, which is not punished as an attempt, and some additional step toward the commission of a substantive crime, which is. Rather than selecting among the competing common law formulations, federal courts applying the law of attempt have looked to the Model Penal Code, which has sought to refine the common law definitions of attempt by adopting a formulation that reflects the purposes that the law of attempt was designed to serve.[6]

The Model Penal Code requires an offender to take a "substantial step" toward the commission of the intended

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[5] See American Law Institute, Model Penal Code § 5.01 commentary at 38-47 (Tent. Draft No. 10, 1960) (discussing various formulations used by common law courts to characterize the kinds of steps necessary to constitute an attempt); Keedy, *Criminal Attempts at Common Law*, 102 U. Pa. L. Rev. 464, 474 (1954).

[6] There is no general federal "attempt" statute, and absent a specific attempt provision attached to a particular offense, attempts are not punishable under federal law. A number of federal criminal statutes, however, include specific attempt provisions. See, *e.g.*, 18 U.S.C. 81 (arson); 18 U.S.C. 112 (assaulting foreign officials); 18 U.S.C. 1113 (attempted murder or manslaughter); 18 U.S.C. (& Supp. IV) 2113 (bank robbery); 21 U.S.C. 846 (narcotics offenses); 21 U.S.C. 963 (narcotics importation offenses).

substantive crime that strongly corroborates the defendant's criminal purpose, but it does not demand that an offender undertake any particular act (such as actually moving toward a bank). See American Law Institute, Model Penal Code § 5.01(1)(c) and (2).[7] All of the court of appeals decisions cited above have adopted the Model Penal Code formulation as the best definition of attempt for purposes of the bank robbery statute. See *Crawford*, 837 F.2d at 340; *McFadden*, 739 F.2d at 151-152; *Schramm*, 715 F.2d at 1254-1255; *Jackson*, 560 F.2d at 117-121; *Stallworth*, 543 F.2d at 1040-1041. That formulation has also been endorsed by virtually every federal court of appeals in construing other federal statutes that prohibit attempts,[8] and by a considerable number of states as well.[9] Although the court of appeals in this case used lan-

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[7] For the convenience of the Court, Section 5.01 of the Model Penal Code (Proposed Official Draft 1962) is reproduced at App. D, *infra*, 14a-16a.

[8] See, *e.g.*, *United States* v. *Dworken*, No. 87-1354 (1st Cir. Aug. 29, 1988), slip op. 8-26 (21 U.S.C. 846); *United States* v. *Mims*, 812 F.2d 1068, 1077 (8th Cir. 1987) (21 U.S.C. 843); *United States* v. *Rovetuso*, 768 F.2d 809, 821 (7th Cir. 1985), cert. denied, 474 U.S. 1076 (1986) (18 U.S.C. 1512(a)(2)(A)); *United States* v. *Johnson*, 767 F.2d 673, 675 (10th Cir. 1985) (21 U.S.C. 846); *United States* v. *McDowell*, 705 F.2d 426, 427-428 (11th Cir. 1983) (same); *United States* v. *Williams*, 704 F.2d 315, 321 (6th Cir.), cert. denied, 464 U.S. 991 (1983) (same); *United States* v. *Rivera-Sola*, 713 F.2d 866, 869 (1st Cir. 1983) (same); *United States* v. *Bunney*, 705 F.2d 378, 381 (10th Cir. 1983) (18 U.S.C. 844(i)); *United States* v. *Ivic*, 700 F.2d 51 (2d Cir. 1983) (same); *United States* v. *Joyce*, 693 F.2d 838, 841 (8th Cir. 1982) (21 U.S.C. 846); *United States* v. *Mowad*, 641 F.2d 1067, 1073 (2d Cir.), cert. denied, 454 U.S. 817 (1981) (22 U.S.C. 2778(c)); *United States* v. *Manley*, 632 F.2d 978, 987 (2d Cir. 1980), cert. denied, 449 U.S. 1112 (1981) (21 U.S.C. 846); *United States* v. *Mandujano*, 499 F.2d 370, 376 (5th Cir. 1974), cert. denied, 419 U.S. 1114 (1975) (same).

[9] The majority of state legislatures that have recodified their criminal codes since the Model Penal Code was promulgated, and

guage similar to that endorsed by the Model Penal Code (see App., *infra*, 4a), the court departed from that test by construing the "substantial step" element to require proof of movement toward the bank or some functional equivalent, a requirement that is not part of the Model Penal Code formulation and has not been adopted by any court that employs that test.

Respondent's actions clearly constituted a substantial step toward the robbery of the bank that strongly corroborated his illegal purpose. When the police approached respondent in the shopping center parking lot across from the bank, respondent had in his van a fake bomb, several demand notes, a police scanner radio tuned to the local police frequency, a notebook containing the FBI radio frequency and that of another local police department, a wig, and several other items (including the stolen van itself) that would be useful for making a getaway. Respondent therefore was in possession of materials to be employed in the commission of the crime, and those materials could have served no lawful purpose in the circumstances. See Model Penal Code § 5.01(2)(e). Respondent's possession of those items strongly corroborated his intent to rob the Security Pacific Bank, because the possession of such items is one of the "preliminary steps" to a robbery that is "uniquely criminal and generally incompatible with innocent purpose." *United States* v. *Manley*, 632 F.2d 978, 989 (2d Cir. 1980), cert. denied, 449 U.S. 1112 (1981). Accord *United States* v. *Rivera-Sola*, 713 F.2d 866, 870 (1st Cir. 1983). And any doubt on that score was eliminated by respondent's post-arrest admissions that he was about to

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several state courts of last resort, have adopted the Model Penal Code formulation. See G. Fletcher, *Rethinking Criminal Law* § 3.3, at 169 (1978); 2 W. LaFave & A. Scott, Jr., *Substantive Criminal Law* § 6.2, at 36-37 (1986).

embark on a bank robbery. The fact that his plans were interrupted before he left a nearby staging area, rather than while he was en route to the bank, does not render the steps he took any less "substantial."

The court of appeals' rule is not responsive to the rationale for the law of criminal attempts. Attempts are punished as a crime because of the great need to stop offenses from occurring and to punish persons who take steps to commit a substantive crime, even if those steps ultimately prove unsuccessful.[10] The court of appeals' rule, however, does not reflect either a defendant's culpability or society's need to prevent a crime from occurring. A person may fully and concretely formulate an unalterable design to commit a bank robbery even though he has not yet left a nearby staging area. Likewise, a robbery may be only moments away even though the robber has not yet begun to assault the bank. In such cases, society should be free to intervene in order not only to stop a crime from coming to pass, but also to punish the defendant for putting innocent parties at risk of the loss of their property, serious injury, or death.

This case proves that point. Driving to the teller's window and placing the fake bomb and demand note on the glass would have taken respondent less than a minute. Only Officer Hensley's arrival prevented a robbery from occurring, and that fortuity ought not to be an exculpating factor. The court of appeals' rule is therefore arbitrary because it is unrelated to the purposes that are served by the

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[10] See, *e.g.*, *United States* v. *Dworken*, slip op. 11 n.4 (citation omitted) ("We agree that 'the only rational function of the law of attempts must be the identification of individuals whose overt behavior manifests dangerous criminal propensities.' "); *United States* v. *Stallworth*, 543 F.2d at 1040-1041; 2 W. LaFave & A. Scott, Jr., *supra*, § 6.2, at 22.

crime of attempt. In fact, the poverty of the court's rule is best illustrated by the fact that respondent would have been guilty of attempted bank robbery under the Ninth Circuit's rule if he had been stopped while he was driving toward the shopping center—even if he had just pulled out of a driveway miles from the bank—because he would have been "actual[ly] mov[ing]" toward the bank at that time. That respondent chose to complete a few last-minute steps in a parking lot a few hundred feet from the bank rather than at home should not exculpate him for having come perilously close to completing his clearly intended course of action.

3. The question in this case is of considerable practical importance. The Ninth Circuit in this case and in *Buffington* has now adopted a rule that effectively forces law enforcement officers to wait until a bank robbery suspect enters a bank or is en route to it before intercepting him and halting a bank robbery. That procedure needlessly puts at risk the lives of innocent bank customers, employees, law enforcement officials, and even the robbers themselves. It is not uncommon for law enforcement officers to learn in advance that a robbery is about to occur, either from an informant in the robbers' camp or from a citizen's tip, as in this case. In that significant class of cases, the officers must often decide how long to wait before arresting the robbers. The Ninth Circuit's rule places officers in the difficult position of having to decide whether to wait until the robbers enter or move toward the bank—with the attendant risks of injury—or to arrest the robbers at an earlier point, when the arrest can be effected with a minimum of risk of injury, but at a point at which the robbers may be immune from prosecution for the attempted bank robbery. In addition, the Ninth Circuit rule enables defendants who are engaged in a bank robbery to go free if they are lucky enough to spot surveillance officers in the

vicinity before they begin their final approach to the bank. Such a rule is not consistent with the purposes of either the attempt doctrine or federal criminal law in general.

Moreover, the number of cases in which that rule could have an effect is quite large. In 1987, according to FBI statistics, approximately 44 percent of all robberies of federally insured financial institutions occurred in states within the jurisdiction of the Ninth Circuit (2689 of 6078 bank robberies). The Ninth Circuit's rule, if allowed to stand, will therefore have a serious and adverse effect on an important area of federal law enforcement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
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OCTOBER 1988

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-1195
D.C. No. CR-S-85-238-TJM

UNITED STATES OF AMERICA, PLAINTIFF/APPELLEE

v.

REGINALD DEAN STILL, DEFENDANT/APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
Thomas J. MacBride, District Judge, Presiding

Argued and Submitted
November 10, 1987—San Francisco, California

Order and Opinion Filed July 1, 1988

ORDER AND OPINION

Before: MARY M. SCHROEDER, HARRY PREGERSON and MELVIN BRUNETTI, Circuit Judges.

Opinion by Judge Brunetti

ORDER

The Opinion filed January 25, 1988, 837 F.2d 871 (9th Cir. 1988) is withdrawn. The attached Opinion shall be filed.

OPINION

BRUNETTI, Circuit Judge:

Reginald Dean Still was indicted and convicted of attempted bank robbery of Security Pacific National Bank, pursuant to 18 U.S.C. § 2113(a)[1] and for interstate transportation of a stolen van, pursuant to 18 U.S.C. § 2312.

Still appeals from the judgment of conviction, contending that the government failed to establish every element of attempted bank robbery beyond a reasonable doubt. Based on this circuit's recent decision in *United States v. Buffington*, 815 F.2d 1292 (9th Cir. 1987), we reverse the conviction of attempted bank robbery and affirm the conviction for interstate transportation of a stolen vehicle.

FACTS

On August 7, 1985, at about 10:30 a.m., a lay witness saw the defendant putting on a long blonde wig while sit-

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[1] Title 18 of the United States Code, § 2113(a) provides:

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

ting in a van with the motor running, parked in the Roseville Square Shopping Center. The van was parked approximately 200 feet away from the Security Pacific Bank. The witness notified the police, who arrived in a marked patrol car shortly thereafter. Upon arrival of the police, the defendant put the van in reverse, and drove off. The police caught up with the defendant, who had fled to a nearby camper/trailer. He was arrested for possession of stolen property and taken to the Roseville Police Department.

Following his arrest, the defendant allegedly volunteered the following statements: "You did a good job. You caught me five minutes before I was going to rob a bank. That's what I was putting the wig on for." "The van is stolen. How much do you get for auto theft around here?"

After waiving his Miranda rights, the defendant told the police that he was planning to rob a bank when the marked police vehicle came up to the van he was in. He planned to drive up to the drive-in window of the bank and place a phony bomb, along with a demand note, on the window. The defendant did not specify, by name, the bank he was planning to rob. He described it as a large, two-story building, made of brown or reddish brick. The defendant stated that Security Pacific sounded like the name of the bank he intended to rob. Of the thirty-nine banks within five miles of the Roseville Square Shopping Center, only Security Pacific fits the defendant's description of the bank he was planning to rob.

The defendant told the police that his statements were just "frosting on the cake" because all of the evidence that they needed was located in the van. Inside the van, the police found a hoax bomb which looked like a real bomb, a red pouch with a demand note taped to it, a long blonde wig, a police scanner programmed to the Roseville Police

Department, and a notebook containing drafts of demand notes and the radio frequency of the Rocklin Police Department.

STANDARD OF REVIEW

Still claims that the evidence is not sufficient to support his conviction for attempted bank robbery. We review the evidence, "in the light most favorable to the prosecution and to the verdicts," *United States v. Hughes*, 626 F.2d 619, 626 (9th Cir.), *cert. denied*, 449 U.S. 1065 (1980), to see if "any rational trier of fact could have found the essential elements of the crime to have been proved beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Lester*, 749 F.2d 1288, 1296 (9th Cir. 1984).

ANALYSIS

A conviction for an attempt requires proof of both "culpable intent" and "conduct constituting a substantial step toward commission of the crime that is in pursuit of that intent." *United States v. Buffington*, 815 F.2d at 1301; *United States v. Snell*, 627 F.2d 186, 187 (9th Cir. 1980), *cert. denied*, 450 U.S. 957 (1981). A "substantial step" is "conduct strongly corroborative of the firmness of the defendant's criminal intent." *United States v. Buffington*, supra; *United States v. Mandujano*, 499 F.2d 370, 376 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114 (1975). "Culpable intent" can be inferred from a particular defendant's conduct and from the surrounding circumstances. *United States v. Buffington*, 815 F.2d at 1302.

In *United States v. Buffington*, supra, this court concluded no rational fact finder could find sufficient evidence of the culpable intent necessary to sustain the conviction for attempted bank robbery. In *Buffington*,

the government presented the following evidence to establish the defendant's intent to rob a particular bank: assemblage and possession of materials necessary to commit the crime, including two handguns, female clothing and a makeup disguise for one defendant, and a multilayered clothing disguise for another defendant; two visits to the location before the attempt; actions to carry out the plan, including driving by the bank twice while staring into it, driving to the rear of the bank, one of the defendants staring out of the window of a nearby store toward the bank, and two of the defendants leaving their vehicle armed and standing with their attention directed toward the bank.

This court concluded that the above evidence did not establish the requisite intent because these actions could just as easily indicate an intent to rob another nearby bank or store. The court stated that the fact no defendant came within 50 yards of the bank could produce no more than a suspicion that they intended to rob that particular bank.

However, the court went on to state that there could be sufficient evidence of the requisite intent without actual entry, citing with approval *Rumfelt v. United States*, 445 F.2d 134 (7th Cir.), *cert. denied*, 404 U.S. 853 (1971). In *Rumfelt*, the defendant's presence in front of the bank with a ski mask, plus his use of a rifle to intimidate a passerby into trying to open the bank door for him established the requisite intent. The *Buffington* court also stated that a defendant's intent to steal could be inferred from statements of co-conspirators or informants, statements which were excluded in *Buffington*.

In this case, Still's intent to rob the Security Pacific National Bank was clearly established in his statements to the police after his arrest. Without prompting, the defendant stated: "You did a good job. You caught me five minutes

before I was going to rob a bank. That's what I was putting the wig on for." After waiving his rights, the defendant stated he intended to use the drive-up window of the bank and place a phony explosive device, along with a note, on that window, to rob a bank. Although the defendant did not state the name of the bank he was planning to rob, he did describe it. Within a five mile area, his description of a large, two-story bank, constructed of brown or reddish color brick fits only the Security Pacific Bank. Additionally, when asked by the police if it was Security Pacific that the defendant intended to rob, he said that Security Pacific sounded like the name of the bank he was going to rob. These statements permit an inference of an unequivocal intent to rob the Security Pacific Bank. Therefore, the first aspect of an attempt, a culpable intent, was established beyond a reasonable doubt.

To establish the second aspect of an attempt, "a substantial step," more than mere preparation must be shown. *United States v. Taylor*, 716 F.2d 701, 712 (9th Cir. 1983). "[T]here must be some appreciable fragment of the crime committed, it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter, and the act must not be equivocal in nature." *United States v. Buffington*, 815 F.2d at 1302, citing with approval *United States v. Mandujano*, 499 F.2d at 376.

In *Buffington*, the court concluded that the defendants' conduct did not cross the line between preparation and attempt. Although the defendants had assembled the disguises and materials necessary to commit the robbery, drove by the bank twice while staring into it, and left their vehicle, armed, and stood with their attention focused on the bank, the court emphasized that none of them made any move toward the bank. Thus, standing alone, the de-

fendants' conduct was too tentative and unfocused to constitute either the requisite "appreciable fragment" of a bank robbery, or a step toward the commission of the crime of such substantiality that, unless frustrated, the crime would have occurred. *United States v. Buffington*, 815 F.2d at 1303.

The *Buffington* court stopped short of expressly requiring some actual movement toward the bank to show a substantial step toward an attempt. They cited *United States v. Snell*, supra, with approval, where this circuit upheld a conviction for attempted robbery without actual movement toward the bank, reasoning that the defendants' entry into the victim's home was analytically similar to entry into a bank.

Our facts do not establish either actual movement toward the bank or actions that are analytically similar to such movement. Before he was apprehended by the police, Still was seen sitting in his van, with the motor running, wearing a long blond wig, parked approximately 200 feet away from the Security Pacific National Bank. Considering that the *Buffington* defendants' actions went further in manifesting a substantial step than did Still's actions, *Buffington* compels the conclusion that proof of a substantial step toward the attempt was not established beyond a reasonable doubt.

While Still appealed the judgment of conviction, he did not contest the conviction for interstate transportation of a stolen van pursuant to 18 U.S.C. § 2312 and we affirm that conviction.

The district court sentenced Still to a fifteen year term on the conviction of attempted bank robbery, suspended imposition of the sentence on the conviction of interstate transportation of a stolen vehicle and placed Still on five years probation to commence on the expiration of the

sentence for attempted bank robbery. It appears that the district court judge attempted to structure a sentence of custody and probation based upon the two convictions and now that the bank robbery conviction has been reversed the district court should be allowed to reconsider the sentencing on the stolen vehicle conviction. *United States v. Hagler*, 709 F.2d 578, 579 (9th Cir.), *cert. denied*, 464 U.S. 917 (1983). We remand this case to the district court for resentencing.

REVERSED IN PART, AFFIRMED IN PART, REMANDED FOR RESENTENCING.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86-1195
D.C. No. CR-S-85-238-TJM

UNITED STATES OF AMERICA, PLAINTIFF/APPELLEE

v.

REGINALD DEAN STILL, DEFENDANT/APPELLANT

[Filed July 6, 1988]

ORDER

Before: SCHROEDER, PREGERSON and BRUNETTI, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86-1195
D.C. No. CR-S-85-238-TJM

UNITED STATES OF AMERICA, PLAINTIFF/APPELLEE

v.

REGINALD DEAN STILL, DEFENDANT/APPELLANT

Filed September 20, 1988

ORDER

Before: MARY M. SCHROEDER, HARRY PREGERSON and MELVIN BRUNETTI, Circuit Judges.

ORDER

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

In reviewing jury instructions, "a single instruction to a jury may not be viewed in artificial isolation, but must be viewed in the context of the overall charge." *United States v. Abushi*, 682 F.2d 1289, 1299 (9th Cir. 1982), quoting *United States v. Park*, 421 U.S. 658, 674 (1975). We give the trial judge "substantial latitude" so long as the instructions "fairly and adequately cover the issues presented." *United States v. Abushi*, 682 F.2d at 1299. Because Still neither objected to the court's instruction on clear and convincing evidence when given the opportunity to do so,

nor offered a definition of clear and convincing evidence in his proposed instructions, we review the instructions given under the "plain error" standard. *United States v. Bustillo*, 789 F.2d 1364, 1367 (9th Cir. 1986). "Reversal of a criminal conviction on the basis of plain error is an exceptional remedy, which we invoke only when it appears necessary to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial process." *Id.*; *United States v. Paris*, 827 F.2d 395, 398 (9th Cir. 1987).

Here, the alleged "plain error" is an omission from the jury instructions which rendered them misleading. However "an improper instruction rarely justifies a finding of plain error." *United States v. Glickman*, 604 F.2d 625, 632 (9th Cir. 1979), *cert. denied*, 444 U.S. 1080 (1980). Additionally, "it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson v. Kibe*, 431 U.S. 145, 154 (1976).

In this case, the context and language of the overall charge indicates there has been no miscarriage of justice. As in *Henderson v. Kibe*, supra, where the Supreme Court concluded that there was no plain error when the trial court failed to give any explanation of causation beyond the reading of the statute itself, we conclude that the court's reading of the statutory language regarding the definition of insanity and the defendant's burden of proof of clear and convincing evidence does not demonstrate plain error.

Additionally, the trial court's instructions contrasted the differences between the government's burden of proof and the defendant's burden of proof:

> Bear in mind that in a criminal case the burden of proof is on the government to prove each element of the case beyond a reasonable doubt; but if a defendant

raises the issue of insanity, the burden of proof on that issue and that issue alone is on the defendant and to prevail on that defense he must show insanity as defined in these instructions by clear and convincing evidence.

Finally, the court's instructions conformed almost entirely with federal model jury instructions. *See* 1 E.Devitt, C. Blackmar and M. Wolff, *Federal Jury Practice and Instructions* § 14.17, p. 307 (3d ed. 1987 supp.); *Manual of Model Jury Instructions for the Ninth Circuit* § 6.03, p. 93 (1985). The comments following the Devitt and Blackmar instruction state "no definition of clear and convincing evidence is included. It appears that the term has not usually been defined when used in jury instructions, as in libel cases." Due to the absence of such a definition in the model instructions and the context and language of the trial court's overall charge, we cannot conclude that the district court committed plain error.

The district court's refusal to permit the County Jail psychiatrist to testify does not constitute reversible error. The trial court has broad discretion when determining whether to admit or exclude expert testimony and we will reverse only if the decision is "manifestly erroneous." *United States v. Gann*, 732 F.2d 714, 724 (9th Cir.), *cert. denied*, 469 U.S. 1034 (1984). Still's stated sole purpose for offering the testimony of the County Jail psychiatrist was to establish that the doctor had been prescribing Still antipsychotic medications for a particular purpose and for a particular time. However, the court permitted the government's expert witness to testify to this same information and instructed Still that the court would consider granting a request from him to bring the county psychiatrist back for rebuttal if Still was dissatisfied with the testimony of the government's expert witness. The court also expressed

a concern that by admitting the county psychiatrist's testimony, the court might be interfering with the treatment of prisoners in jails because prisoners might ask for more drugs to create the impression that they need more drugs. Considering the potential for interference with the proper treatment of prisoners and the admission of essentially the same testimony, we conclude that the trial court's decision to exclude the county psychiatrist's testimony was not manifestly erroneous.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

Section 5.01 of the Model Penal Code (Proposed Official Draft 1962) provides as follows:

(1) *Definition of Attempt.* A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

(c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) *Conduct Which May Be Held A Substantial Step Under Subsection (1)(c).* Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

(a) lying in wait, searching for or following the contemplated victim of the crime;

(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;

(c) reconnoitering the place contemplated for the commission of the crime;

(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;

(e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;

(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place complated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances.

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

(3) *Conduct Designed to Aid Another in Commission of a Crime.* A person who engages in conduct designed to aid another to commit a crime which would establish his complicity under Section 2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person.

(4) *Renunciation of Criminal Purpose.* When the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, af-

fect the liability of an accomplice who did not join in such abandonment or prevention.

Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

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